No. 87-1555

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents defend the court of appeals' decision in this case by embracing all of its principal errors. Like the court below, respondents presume, without balancing the competing interests, that a search cannot be constitutional in the absence of particularized suspicion. Like the court below, respondents overstate the privacy interests at stake, chiefly by ignoring, or misconstruing, the regulated nature of the industry and its employees. And like the court below, respondents minimize the compelling government interest in railroad safety, by asserting without evidence that the FRA regulations do not advance that interest and by proposing in their place a litany of "less drastic" alternatives.

1. Respondents acknowledge that the constitutionality of the FRA regulations "is governed by th[e] * * * test of 'reasonableness under all the circumstances' " (Br. 17,

citing *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985) (citation omitted)). They recognize, moreover, that "the determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails' " (Resp. Br. 15, quoting *T.L.O.*, 469 U.S. at 337). But having set out the appropriate framework, respondents, like the court below (Pet. App. 25a), then bypass the balancing test altogether. Relying entirely on *T.L.O.* (see Resp. Br. 17-19), respondents assert that to conduct a testing program that is constitutional under the Fourth Amendment, "a railroad [must] have reasonable grounds for suspecting that the search will turn up evidence of a violation" (Br. 19).

This Court did not establish any such hard-and-fast rule in the *T.L.O.* case. Although the Court found, on that particular record, that there were reasonable grounds to believe that the search of the student's handbag would turn up relevant evidence, the Court made clear that it was not "decid[ing] whether individualized suspicion is an essential element of the reasonableness standard [it] adopt[ed] * * *" (469 U.S. at 342 n.8). In fact, the Court emphasized, while " 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion' " (*ibid.*, quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976)).[1] And the Court suggested that "[e]xceptions to the

[1] Indeed, if there were such an irreducible requirement of individualized suspicion, it would call into question such widespread security measures as magnetometer searches of airline passengers and persons entering a courthouse. See, *e.g.*, *McMorris* v. *Alioto*, 567 F.2d 897 (9th Cir. 1978); *United States* v. *Davis*, 482 F.2d 893, 913-914 (9th Cir. 1973).

requirement of individualized suspicion" might be made "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field" ' " (*ibid.* (citations omitted)). For the reasons stated in our opening brief, we believe that the FRA regulations amply satisfy that standard of reasonableness.[2]

2. Respondents contend (Br. 21-35) that the FRA regulations infringe upon "significant privacy interests" (Br. 21). In particular, they assert, "[t]o the individual being tested, there are distinct feelings of humiliation, offensiveness, anger, distrust, distress, emotional pain, concern, apprehension, and anxiety over errors" (*ibid.*).

a. Respondents' concerns are in part rooted in their mistaken assumption that "each urine sample [must] be

[2] Respondents contend (Br. 15 n.6) that even if the Court were to reject the particularized suspicion requirement in this case, the FRA regulations would nonetheless be unconstitutional because they "cannot satisfy the two prong test of *New Jersey* v. *T.L.O.*, that the searches are justified at the inception and reasonably related in scope to the circumstances which justified the search." Respondents appear to believe that the "two prong test" articulated in *T.L.O.* imposes its own requirement of particularized suspicion, wholly apart from what the balance of competing interests otherwise suggests. That is a plain misreading of the case. In stating that a search must be " 'justified at its inception' " and " 'reasonably related in scope' " (469 U.S. at 341, quoting *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968)), the Court did not purport to establish any base-line standard of reasonableness. Rather, the "test" in *T.L.O.* simply requires that a search be "justified" and "reasonable" according to the standard of reasonableness entailed by the balance of relevant interests (see 469 U.S. at 337). Indeed, the *Terry* case, from which the *T.L.O.* "two prong test" derives, uses that test simply to frame the balancing inquiry, not as a proxy for the particularized suspicion standard (or any other standard) of reasonableness. See *Terry*, 392 U.S. at 19-28.

provided under the 'direct observation' of technicians" (Br. 5; see also Br. 23). In support of that claim, respondents cite (Br. 5, 23) a passage in the FRA *Field Manual*—governing Subpart D, but not Subpart C—that suggests that urine should be collected "[u]nder direct observation" (Federal Railroad Admin., U.S. Dep't of Transp., *Field Manual: Control of Alcohol and Drug Use in Railroad Operation* D-5 (Mar. 1986) [hereinafter *Field Manual*]). The preamble to the FRA regulations explains, however, that while "observation is the most effective means of ensuring that the sample is that of the employee and has not been diluted," the final rule "does not require observation of sample collection." 50 Fed. Reg. 31555 (1985). The *Field Manual,* moreover, as its language makes clear, provides only "one means of achieving positive control over specimen collection," and it recognizes that "[o]ther methods of control are equally suitable" (*Field Manual* at D-1). Accordingly, the Field Manual offers several alternatives to "direct observation," including checking the sample for temperature, color, pH balance, specific gravity, and dilution (*id.* at D-5; see also *id.* at B-15). In short, the procedures identified by respondents "are not intended to * * * constitute federal requirements" but rather "are suggestions based on extensive experience that can assist in properly documenting a urine test result" (*id.* at D-1 to D-2).[3]

[3] On May 10, 1988, the FRA issued a Notice of Proposed Rulemaking (53 Fed. Reg. 16640) that, when final, will incorporate (see *id.* at 16650) in Subpart D of the FRA regulations substantial portions of the regulations issued by the Department of Health and Human Services for all federal employee drug-testing programs. See *Mandatory Guidelines for Federal Workplace Drug Testing Programs,* 53 Fed. Reg. 11979 (1988) [hereinafter HHS Reg.]. Included among the incorporated regulations—which are expected to take effect within several months—is HHS Reg. § 2.2(f)(7), which entitles an employee to provide his specimen in the privacy of a stall.

b. Respondents also find the FRA testing offensive because they reject what they term "the closely-regulated industry exception to particularized suspicion" (Br. 28). That mistakes the nature of our contention. We do not assert that the regulated nature of the railroad business creates an "exception" to the particularized suspicion standard. Rather, the regulatory framework reduces employees' expectations of privacy and, in that way, significantly affects the Fourth Amendment balance of interests. Railroad operating personnel, as we explained at length in our opening brief (at 26-30), work in an industry that has historically taken aggressive measures, both privately and through government action, to regulate in furtherance of railroad safety. Employees in that industry "cannot help but be aware that [they] 'will be subject to effective inspection.' " *Donovan v. Dewey,* 452 U.S. 594, 603 (1981) (footnote and citation omitted).

There is no reason to discount the regulatory framework, as respondents urge (Br. 28-29), simply because this case involves the search of a person, rather than the search of property. We acknowledge, of course, that "[t]he integrity of an individual's person is a cherished value of our society" (*Schmerber* v. *California,* 384 U.S. 757, 772 (1966)), and that the search of a person may be "a severe violation of subjective expectations of privacy" (*T.L.O.,* 469 U.S. at 338). But "the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable" (*ibid.*); and, as Justice Powell explained in his concurring opinion in *T.L.O.,* the reasonableness of a person's expectations—even with respect to personal searches—will depend, in part, on the "environment" in which he works (see *id.* at 348 (Powell, J., concurring)). Recognizing that principle, two courts of appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has

reduced employees' expectations of privacy. See *Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant engineers); *Shoemaker* v. *Handel*, 795 F.2d 1136, 1142 (3d Cir.), cert. denied, 479 U.S. 986 (1986) (race track employees). Because the railroad industry, and those who work in it, are likewise subject to substantial public and private regulation—the latter of which respondents do not address—operating employees have a reduced expectation of privacy as against measures designed to promote railroad safety.

c. The FRA regulations are not unduly intrusive simply because they do not "prevent a prosecutor from gaining immediate access to blood and urine samples, or to test results, for use in a criminal proceeding" (Br. 24). This Court rejected a similar claim in *New York* v. *Burger*, No. 86-80 (June 19, 1987). At issue in *Burger* was the constitutionality of a state statute authorizing police officers to enter automobile junkyards, without a warrant or particularized suspicion, and to examine the owner's business records. The lower court had invalidated the statute under the Fourth Amendment because it authorized searches " 'solely to uncover evidence of criminality' " (slip op. 20 (citation omitted)). This Court reversed, recognizing that "both administrative and penal schemes can serve the same purposes" (*id.* at 20-21).[4] The Court observed that the searches at issue promoted the stated regulatory purposes of the statute (*id.* at 23), and it rejected the proposition that "this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself" (*id.* at 24). As the Court concluded, "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect" (*ibid.*).[5]

[4] See *T.L.O.*, 469 U.S. at 341 n.7; *Michigan* v. *Clifford*, 464 U.S. 287, 294 (1984).

The same principle applies here. The FRA has mandated urine and blood testing, not to assist in the prosecution of employees but rather "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" (49 C.F.R. 219.1(a)). The fact that the government may separately pursue criminal charges does not detract from the administrative nature of the FRA regulations.

d. Respondents also find the FRA regulations intrusive because, in their view, "railroad supervisory personnel are given great discretion in determining whether a test is to be conducted" (Br. 33). There is, to be sure, *some* element of discretion in just about everything employers do, and the testing program mandated by the FRA is no exception. For example, under Subpart C the employer must decide whether a fatality has occurred, whether hazardous material has been released, or whether there has been damage to railroad property amounting to $500,000 or more (49 C.F.R. 219.201(a)(1)). But those judgments, and the others mandated by the regulations, hardly involve what respondents call "great discretion," any more than did the discretion of Border Patrol officials in selecting the checkpoint locations in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 559-560 n.13 (1976) (upholding the routine stopping of vehicles at permanent checkpoints, in the absence of particularized suspicion).[6]

[5] Contrary to respondents' suggestion (Br. 24), the Court's decision on this issue was not dicta, but a square rejection of the lower court's holding.

[6] As an "example of the wide discretion afforded officials" under the regulations, respondents cite an "Arkansas accident * * * in which

Respondents contend, however, that even this limited amount of discretion may be abused, because there is a possibility of "harassment" by employers (Br. 33 (footnote omitted)) and testing errors by the laboratory (Br. 34).[7]

tornado-like winds caused a train to derail" (Br. 34). The FRA explained at the time, however, that for two reasons the regulations could not make exceptions "for acts of God" (J.A. 165). First, "it is nearly always difficult to determine accurately and quickly what caused, or contributed to the severity of, a major train accident" (*ibid.*). A blanket exception for accidents caused by severe weather conditions would therefore be difficult to apply. Second, "[e]ven in the case of a derailment of a portion of a train caused by a tornado, proper observation of weather conditions and coordination of train and locomotive brakes may in some cases prevent a larger and more costly derailment. Absence of toxicological testing may leave unanswered one key question about the fitness of the crewmembers." *Id.* at 165-166. In any event, the Arkansas incident reveals how the FRA regulations confine, not expand, the employer's discretion to determine who and when to test.

[7] Respondents also contend (Br. 22) that "the test under the FRA rule is founded on distrust, and stigmatizes the employee as a suspected law breaker." Respondents do not explain that assertion, and in our view they "overstate the consequences" of the testing process (*United States* v. *Martinez-Fuerte,* 428 U.S. at 560). Under Subpart C of the regulations, a covered employee is subject to post-accident testing only when certain objective criteria, relating solely to the accident or incident, have been met. The triggering events were selected, not to "stigmatize" employees as "law breaker[s]," but because each of those events was "of substantial public interest" and represented an "accident[] for which, based on FRA's experience, causal determination is often extremely difficult." 50 Fed. Reg. 31542 (1985). What is more, except in unusual cases, every operating employee aboard the train involved in the accident must be tested (see 49 C.F.R. 219.203(a)(2), 219.203(a)(3)(i)). That across-the-board testing requirement reduces to a minimum any sense that an employee has been singled out for drug and alcohol testing. Similarly, under Subpart D, although employees may sometimes be singled out for testing, it is only because some objective criterion, such as responsibility for the severity of an accident, has been satisfied.

But the FRA took considerable measures to guard against those possibilities. A railroad that requires post-accident testing in bad faith (see 49 C.F.R. 219.201(c)), or that willfully imposes a program of authorized testing that does not comply with Subpart D (see *id.* § 219.9(a)(3)), or that otherwise fails to follow the FRA regulations (see *id.* § 219.9(a)(5)) is subject to civil penalties (see *id.* Pt. 219, App. A), in addition to whatever damages may be awarded through the arbitration process.[8] The regulations also require careful collection and handling procedures and highly proficient screening and confirmatory techniques, to protect against the possibility of testing errors (see Pet. Br. 10, 11-12 & n.17). What is more, employees are entitled to challenge a positive test result before a final investigative report is prepared (49 C.F.R. 219.211(a)(2)), and they are granted a hearing concerning a refusal to take the test (*id.* § 219.213).[9]

We do not suggest, of course, that no mistakes will ever be made in individual cases. But here, as in *Bell* v. *Wolfish,* 441 U.S. 520 (1979), the regulations have been challenged on their face, and thus "we deal * * * with the

[8] The FRA explained (50 Fed. Reg. 31531 (1985)) that the penalty schedule in the regulations "recognizes that the best sanctions for certain prohibited conduct will be effected by private mechanisms. For instance, if an employee is suspended as a result of a breath or urine test that was poorly conducted, the most effective remedy will be the award of back pay and benefits to the employee by the board of arbitration."

[9] Respondents suggest (Br. 27) that the content of this hearing—which is addressed only to whether an employee improperly refused to take a post-accident test—somehow denies employees the due process right to contest the testing procedures or the results of the test. That is not so. An employee retains any right he may have to contest any disciplinary action under procedures prescribed by the Railway Labor Act, 45 U.S.C. 151 *et seq.*

question whether [drug and alcohol testing] can *ever* be conducted on less than [particularized suspicion]" (*id.* at 560 (emphasis in original)). If, in a particular case, there is harassment (and respondents do not point to any in their brief), or there is laboratory error, an employee has a variety of private remedies available through the arbitration process. Individual errors, however, do not vitiate the essential reasonableness of the regulatory scheme as a whole.

3. Finally, respondents contend (Br. 35-43) that "the FRA regulations do not serve compelling governmental interests" (Br. 35). They speculate (Br. 36-37) that the testing will not promote greater deterrence, and they assert (Br. 37-38) that acquiring reliable data on the cause of accidents is not a sufficient justification for conducting the tests. Respondents also claim that the FRA regulations are not "reasonably relate[d]" (Br. 19) to the government's purposes, since blood and urine tests cannot measure present impairment. And respondents urge (Br. 38-43) that several "less drastic and equally effective means" (Br. 40) could be adopted "to address the legitimate governmental concerns" at stake.

a. Respondents offer nothing but conjecture to support their assertion that the FRA regulations will not deter drug and alcohol abuse by railroad employees. They contend that "[a]n employee who is not already deterred by the risk of an accident while impaired is not likely to be deterred by the risk of a post accident test" (Br. 36). After prolonged study and evaluation, the FRA determined otherwise, and its conclusion accords with common sense. An employee who is not sufficiently deterred by the prospect of *being* in an accident may well be deterred by the prospect of *being held responsible* for the accident and for a violation of the railroad's substance abuse rules. Drug

and alcohol testing increases deterrence by sharpening its focus, identifying the individual or individuals aboard the train whose impairment has caused the accident or incident. As we stated in our opening brief (at 38 n.40), moreover, there is every reason to believe that the FRA post-accident testing program has begun to achieve some of its intended deterrent effects.[10]

b. Respondents acknowledge that "the public interest justifies determining the cause of each railroad accident," but they contend that reliable data can be gathered even under a regime of particularized suspicion (Br. 37). As we explained at greater length in our opening brief (at 42-44), however, the FRA rejected that suggestion, and its reasons are persuasive. Many drug and alcohol abusers do not betray symptoms that are readily discernible to the naked eye. Supervisors and co-workers, moreover, have not proved willing or able to observe their colleagues and report substance abuse when they see it. And after an accident, symptoms of substance abuse that might otherwise have been discernible may be masked by injury, shock, or fatigue. In short, there will be a great many accidents and incidents in which no particularized signs of alcohol or drug impairment will be evident. The FRA should not be precluded, as respondents would have it, from determining the cause of those accidents.

c. Respondents contend that the FRA regulations are not "reasonably relate[d]" to the government's purposes because, in their view, "neither blood nor urine tests can measure current drug intoxication or degree of impair-

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[10] Apparently at least one locality has experienced similar results. See *Brief Amicus Curiae In Support Of Petition For A Writ Of Certiorari, Southern California Rapid Transit District,* at 15-16 (detailing the decreasing percentage of bus operators testing positive for illegal drugs since the inception of testing program).

ment" (Br. 19). We have shown in our opening brief (at 40-42) why that claim is unpersuasive. Respondents seem to believe that because a urine test, standing alone, cannot dispositively show current drug impairment, it therefore follows that an employer should not be permitted to require such a test. "But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence' " (*New Jersey* v. *T.L.O.*, 469 U.S. at 345 (quoting Fed. Rule Evid. 401)). Applying that principle, the FRA has explained that the results from a urine test must be considered in conjunction with other information before a judgment can be reached as to how an accident occurred. 49 Fed. Reg. 24291 (1984).[11] Some of that additional information will be provided by the mandated blood tests, which, the FRA found, "can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects" (*ibid.*).[12] Finally, and in any

[11] Respondents press on the Court (Br. 19) the palpably fallacious argument that because a positive urinalysis result is not a *sufficient* condition of impairment at the time of the accident, it therefore follows that the test is not reasonably related to railroad safety. But a positive result is at least a necessary, if not wholly sufficient, condition of such impairment. In our view, any test that reveals what is a necessary condition of dangerous behavior, and a sufficient condition of being *disposed* to such behavior, is a test that is reasonably related to railroad safety.

[12] In a glancing footnote, respondents assert that "[b]lood tests can determine recent [drug] usage, but not impairment" (Br. 20 n.11). The FRA concluded that blood testing can provide information pertinent to both recency of use and impairment, relying, in part, on findings prepared by the National Institute on Drug Abuse (see J.A. 63). Respondents do not explain why they dispute those findings. Indeed, the AFL-CIO, as amicus curiae in support of respondents, acknowledges that "blood testing *alone* is sufficient * * * to determine whether the individual tested is under the influence of a drug at the time of the test" (Br. 17 (emphasis in original)).

event, the FRA regulations are designed not only to discern impairment but also to deter it. Respondents cannot quarrel seriously with the FRA's determination that urine tests, whatever their technical limitations, provide a significant deterrent to the use of drugs by railroad employees who are about to go on duty.

d. Finally, respondents offer a list of "less drastic" alternatives to the FRA regulations, which, in their view, will prove "equally effective" in "address[ing] the legitimate governmental concerns" (Br. 40). But "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983). This Court has cautioned against "indulg[ing] in 'unrealistic second-guessing,' " because " 'creative judge[s], engaged in *post hoc* evaluations of [government] conduct can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished.' " *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (quoting *United States* v. *Sharpe*, 470 U.S. 675, 686-687 (1985)). As the Court has explained, "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-557 n.12 (1976). Accord *Colorado* v. *Bertine*, 479 U.S. 367, 373-375 (1987); *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973).

In the present case, the FRA expressly considered the alternatives to drug and alcohol testing and found them

wanting. See Pet. Br. 5-6 & n.6. While it agreed with respondents (see Br. 41) that the promulgation of Rule G by the railroads was a step in the right direction (48 Fed. Reg. 30723 (1983)), it concluded that enforcement efforts had proved inadequate (49 Fed. Reg. 24266 (1984)), and it found that the widespread perception of "unchecked management discretion to excuse or punish" had undermined the legitimacy of the rule itself (*id.* at 24267). Closer observation by railroad supervisors (see Br. 42-43) was no answer either, the FRA determined, because there was a "conspiracy of silence" among railroad employees concerning alcohol and drug use. 49 Fed. Reg. 24281 (1984). And while the FRA, like respondents (see Br. 41), believed that voluntary programs "offer[ed] hope for turning the problem around over the long term," it concluded that "[e]xclusive reliance" on such industry programs was "not warranted by available information and would be detrimental to the voluntary programs themselves" (50 Fed. Reg. 31527 (1985)).[13]

[13] Respondents also suggest (Br. 41-42) that the FRA could accomplish its goals by adopting the less "invasive" (Br. 42) techniques employed by the Los Angeles Police Department in a pilot program for detecting drug-impaired drivers. To make the required identification, police officers are trained to conduct a four-step inquiry, including an interview concerning the suspect's medical and drug use history; an evaluation of the suspect's alertness and responsiveness; a measurement of certain physiological symptoms; and a battery of behavioral tests (J.A. 174). It is not clear that those procedures are truly less "invasive" than the FRA regulations. Nor is the Los Angeles program "equally effective" (Br. 40). Preliminary results show that the trained officers usually fail to detect certain types of drug use (such as amphetamines), and also fail to detect most drug use at low dosages (J.A. 177). What is more, the Los Angeles program, at its best, enables officers simply to identify drug users; it does not enable them, as the FRA procedures do, to discern how much of a particular drug is present. Respondents do not explain why they evidently prefer a less precise method of detection.

At bottom, respondents' insistence on "less drastic" alternatives would require this Court to second-guess the conclusions drawn by the FRA after years of investigation and study.[14] Such a course is not only imprudent but is

[14] Apart from their general reliance on "less drastic" alternatives, respondents catalogue several narrower objections to the details of the FRA program. For example, they quarrel with the fact that "management personnel are excluded" from the testing (Br. 3), despite the FRA's determination that "[t]he available accident statistics confirm that the biggest part of the alcohol and drug problem * * * is concentrated among the[] crafts that perform 'covered service.' " 49 Fed. Reg. 24286 (1984). And the category of "covered service" includes *all* employees, management or otherwise, that perform the services subject to the Hours of Service Act (45 U.S.C. 61-64b) (50 Fed. Reg. 31530 (1985)). Respondents also object to the fact that under Subpart C "the entire crew of a train is required to be tested" (Br. 4), despite the FRA's determination that "operating employees are most often at fault in alcohol and drug-related accidents"; that "some alcohol and drug-related accidents in the past have involved apparent sequential or simultaneous failures of performance by two or more crew members"; and that it is "extreme[ly] difficult[] [to] distinguish[] fault and degrees of fault immediately after the more substantial accidents * * *." 50 Fed. Reg. 31544 (1985). What is more, the suggestion (Br. 4) that under Subpart D the entire crew may be tested ignores the discriminating criteria that must be satisfied before any authorized testing may be conducted. Respondents also dispute the fact that "no tests are required at highway grade crossings" (Br. 4), despite the FRA's finding that "in the vast majority of cases railroad employees can only be viewed as additional victims of those tragedies, since they have no real opportunity to avoid them." 50 Fed. Reg. 31543 (1985). In a similar vein, respondents contest the need to test for alcohol and drug abuse, because of what they find to be a low statistical relationship between substance abuse and the total of all accidents and incidents (Br. 2). But respondents' comparisons are misleading, since they do not measure the relationship between substance abuse and the much narrower categories of serious accidents and incidents that actually give rise to mandatory or authorized testing under the regulations. The FRA decided to cover those categories precisely because

also inconsistent with the judgment of Congress, which, in enacting the Federal Railroad Safety Act of 1970, 45 U.S.C. (& Supp. III) 421 *et seq.*, expressly delegated broad authority to the Secretary to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety" (45 U.S.C. 431(a)). The Congress recognized that "a combination of factors ha[d] contributed to a steady decline in the rail safety picture" (H.R. Rep. 91-1194, 91st Cong. 2d Sess. 9 (1970)), and it therefore resolved to give the Secretary all of the "necessary administrative powers to carry out his duties[,]" including, but not limited to, the authority to require the "testing of railroad facilities [and] * * * persons" (*id.* at 21). The FRA, by delegation from the Secretary, has carried out that congressional assignment in a careful and deliberate manner. There is no constitutional warrant for overturning its judgment.[15]

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it found that alcohol and drugs were often a causal factor. See 50 Fed. Reg. 31542-31543 (1985). Moreover, respondents do not take into account the enormous costs of the covered accidents, in dollars and in lives, wholly apart from the statistical frequency with which they occur. Finally, respondents err in suggesting (Br. 5, 34) that the FRA regulations confer unbridled testing authority on private railroads. By their terms, the regulations purport only to confer the specific authority contained in Subpart D. If a railroad elects to test in a manner not prescribed by the FRA regulations, that is a matter for resolution under the Railway Labor Act, 45 U.S.C. 151 *et seq.* See *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n,* No. 88-1 (cert. granted, Oct 3, 1988).

[15] We note, in this connection, the contention of the AFL-CIO, as amicus curiae, that the FRA lacked the authority to promulgate Subpart D of the regulations. That is so, the amicus contends, because Subpart D permits railroads to implement safety programs that "trump[] the [Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*] by precluding collective bargaining over matters which the RLA plainly commits to its bargaining process" (Br. 24). That claim was not raised by any of the parties below, was not considered by the court of appeals, was not set forth or fairly included in the petition for a writ of

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certiorari, and has not been addressed by respondents in support of the court of appeals' decision. As such, it is not properly before this Court for review. See Sup. Ct. R. 21.1(a); *United States* v. *Mendenhall,* 446 U.S. 544, 551-552 n.5 (1980); *Youakim* v. *Miller,* 425 U.S. 231, 234 (1979); *Mazer* v. *Stein,* 347 U.S. 201, 206 n. 5 (1954). In any event, the claim is entirely meritless. By its terms, Section 202(a) of the Federal Railroad Safety Act of 1970 states that the Secretary may not issue rules and regulations relating to qualifications of employees "except such qualifications as are specifically related to safety" (45 U.S.C. 431(a)). Thus, the plain language of the Act affords the Secretary the power to override RLA agreements to the extent that they impinge on safety requirements. That language, moreover, was not accidental. A precursor of the 1970 Act had specifically precluded the Secretary from interfering with RLA agreements, by (1) prohibiting the Secretary from issuing *any* regulations relating to employee qualifications, regardless of the nexus to safety and (2) providing expressly that "[n]othing in th[e] Act shall in any way be construed or applied so as to abridge, modify, limit, supersede, or repeal any provision of the Railway Labor Act * * * or any agreements made pursuant thereto" (see *Federal Railroad Safety Act of 1969: Hearings on S. 1933, S. 2915, and S. 3061 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce,* 91st Cong., 1st Sess. 1, 2 (1969)). Both of those provisions restricting the Secretary's power to override RLA agreements were deleted in the final legislation, explicitly to "insure the fact that collective bargaining will not be used as a vehicle for undermining safety standards" (115 Cong. Rec. 40205 (1969) (Sen. Prouty)). As the accompanying Senate Report made clear, because of those deletions "[t]he protection for agreements, arrived at through collective bargaining, [do] not * * * extend to those agreements or elements thereof which were inconsistent with rules, regulations, or standards prescribed by the Secretary in accordance with the authority over railroad safety granted to him by this act." S. Rep. 91-619, 91st Cong., 1st Sess. 6 (1969). Finally, amicus' contention (Br. 28-29) that Subpart D is beyond the Secretary's authority because it authorizes, but does not mandate, certain testing procedures, cannot be squared with the broad language of Section 202(a), 45 U.S.C. 431(a), which empowers the Secretary to prescribe "appropriate" regulations "as necessary" to ensure railroad safety. There is no language requiring the Secretary to promulgate only those regulations that state mandatory standards. Moreover, where a railroad chooses to invoke the authority conferred by Subpart D, it is constrained by the mandatory procedures and safeguards set out in those provisions.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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